". . . . . An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial Judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

We would set aside the conviction and sentence and restore the order of acquittal and discharge of the learned President on the 2nd charge in respect of the two applicants.

Order accordingly.

Solicitors: *Gunaratnam & Co.; Joseph & Son.*

GOH AH BA v. MOHAMED ZAIN BIN SUDIN

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C.JJ.) May 12 & July 1, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 104 of 1985]

Tort — Negligence — Damages — Compound fracture of right upper tibia/fibula — Shortening of right leg — Indigenous treatment — Failure to mitigate damages — Loss of earnings — Special damages.

Damages — Leg — Tibia/fibula compound fracture — 1.5 c.m. shortening.

In this case the respondent had been injured when a piece of plywood fell from the pick-up driven by the appellant and struck the respondent who was at that time riding a motor cycle, as the two vehicles passed each other along the road from opposite directions. The respondent was injured and hospitalised for about four days in hospital and discharged at his own request. The medical report showed that the respondent suffered from a 1½" laceration over the right upper tibia/fibula region with clinically compound fracture of right upper tibia/fibula. A toilet and suture were done for laceration. The fractures in the lower leg was reduced and immobilised in plaster-of-paris case. Subsequently on November 11, 1982 the respondent was further examined by the Consultant Orthopaedic Surgeon, Penang Medical Centre, who confirmed the injuries and concluded that the patient had sustained an open fracture of the tibia at the junction of its upper one-third and lower two-thirds which had united solidly but in a moderately severe angulation position. The fibula had been broken at two sites in the shaft; the upper fracture was not united but the lower fracture was solidly united. As a result, he had leg shortening of 1.5 c.m. with a slight limp when walking. He also had slight knee stiffness and a weaker lower limb. The 1.5 c.m. limb shortening was permanent. There was a danger of osteoarthritis arising in the knee in later years, The doctor was also of the opinion that if the patient had not discharged himself from the General Hospital to seek indigenous treatment the shortening would probably be less in the region of 0.5 to 1 c.m. and the fracture would have ended up with less deformity.

The learned trial Judge awarded $20,000 to the respondent as general damages *i.e.* $18,000 for pain and suffering and $2,000 for loss of amenities. The trial Judge found that prior to the accident the respondent was earning $536 per month as a padi planter but about one year after the accident his income was around $118. Based on this the learned Judge gave an award of $37,351 for special damages, being loss of income up to the date of trial, and $41,617.05 for general damages for loss of future earnings. The appellant appealed against the award of damages.

Held: (1) the award of $18,000 for pain and suffering made by the trial judge was fair and reasonable and in no way excessive;

(2) the award of $37,351 under special damages for loss of earnings was fair and reasonable and in no way excessive;

(3) the trial Judge took into consideration the respondent's failure to mitigate the damages by leaving the General Hospital on his own accord when he deducted 25% from the respondent's monthly earning of $418 and made the award of $41,617.05 under loss of future earnings on the basis of $320 monthly earnings multiplied by sixteen years purchase. He had not erred in so doing.

SUPREME COURT.

Bala Mahesan for the appellant.

Triptipal Singh for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court) : We dismissed this appeal with costs and confirmed the judgment of the learned trial Judge of the High Court, Alor Setar in favour of the respondent/plaintiff. We now give our reasons for doing so.

In the Court below, the respondent sued the appellant for general and special damages due to injuries sustained by him in a motor accident which took place on January 10, 1980 at about 4.15 p.m. along the Jitra/Alor Setar main road when a piece of plywood 4 feet x 8 feet fell from the pick-up driven by the appellant and struck the respondent who was at the material time riding a motor cycle, as the two vehicles passed each other along the road from opposite directions. The respondent was injured and hospitalised for about four days in General Hospital Alor Setar and discharged on his own request.

The General Hospital medical report dated May 12, 1980 as accepted by the trial Judge showed

that the respondent a 27 year-old male Malay, suffered from a 1½" laceration over the right upper tibia/fibula region with clinically compound fracture of right upper tibia/fibula. A toilet and suture were done for laceration. The fractures in the lower leg were reduced and immobilised in plaster-of-paris cast. Subsequently on November 11, 1982 the respondent was further examined by the Consultant Orthopaedic Surgeon. Penang Medical Centre who confirmed the injuries and concluded that the patient had sustained an open fracture of the tibia at the junction of its upper one-third and lower two-thirds which had united solidly but in a moderately severe angulation position. The fibula had been broken at two sites in the shaft; the upper fracture was not united but the lower fracture was solidly united. As a result, he had leg shortening of 1.5 c.m. with a slight limp when walking. He also had slight knee stiffness and a weaker lower limb. The 1.5 c.m. limb shortening was permanent. There was a danger of osteoarthritis arising in the knee in later years. The doctor was also of the opinion that if the patient had not discharged himself from the General Hospital to seek indigenous treatment the shortening would probably be less in the region of 0.5 to 1 c.m. and the fracture would have ended up with less deformity.

Based on the medical opinion stated above and other relevant evidence, the trial Judge awarded the sum of $20,000 to the respondent as general damages *i.e.* $18,000 for pain and suffering and $2,000 for loss of amenities. It was submitted that the sum awarded for general damages was unduly excessive and the trial Judge failed to consider adequately the trend of awards in similar cases. We did not agree. We noted that in the first place the trial Judge considered the injuries and the effect thereof suffered by the respondent including in particular the shortening of the leg as 1 c.m. instead of 1.5 c.m. The award was not only for the shortening but for the other injuries as well. Although the trial Judge did not touch on relevant authorities in his straight-forward judgment, we were satisfied according to the trend of authorities cited to us by both learned counsel, that the award of $18,000 was fair and reasonable and in no way excessive.

The next ground was that the trial Judge erred in computing the respondent's earning and applied different standards in his computation for loss of earnings. We did not agree. The trial Judge's conclusions were that prior to the accident the respondent was earning around $536 per month as a padi planter cultivating 11½ relongs which were handed back to the owners soon after the accident. About one year after the accident, he and his wife managed to cultivate only 2½ relongs and their joint monthly income from that source was around $118. They were still cultivating the 2½ relongs up to the date of the trial. Prior to the accident, the respondent supplemented his income by driving a tractor to plough padi fields and his income was about $2,800 a year. These conclusions were based on evidence of the respondent and other witnesses which the trial Judge accepted after having seen and heard them in the witness box. He was therefore entitled to make his findings on the facts with which in the circumstances the appellate court is reluctant to interfere.

Under special damages, the Judge rightly applied the sum of $536 as the basis for loss of monthly income for the period of one year immediately after the accident. For the rest of the period of 43 months thereafter, he correctly deducted the sum of $118 and applied the lesser sum of $418 instead of $536 as the basis for loss of monthly income. The award of $37,351 under special damages was fair and reasonable and in no way excessive.

The trial Judge also took into consideration the respondent's failure to mitigate the damages by leaving the General Hospital on his own accord when he deducted 25% from respondent's monthly earning of $418 and his award of $41,617.05 under loss of future earnings calculated on the basis of $320 monthly earnings multiplied by sixteen years purchase. We are satisfied that he had not erred.

Order accordingly.

Solicitors: *Bala Mahesan & Co.; Triptipal Singh & Co.*